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LAM PHENG PHENG & ORS v. EUROLAND & DEVELOPMENT SDN BHD; ALL WAYS BUILDER SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[CIVIL SUIT NO: BA-22NCvC-388-10-2021]
B 13 OCTOBER 2022

Abstract – *It is inconsistent with the policy of the Housing Development (Control and Licensing) Act 1966 for the developer, when sued by purchasers for liquidated damages under the sale and purchase agreement, to join the building contractor as a third party, to have the claims and disputes under the building contract jointly tried together with the purchasers' claim for liquidated damages.*

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D ***CIVIL PROCEDURE:*** *Joinder of parties – Joint trial – Purchasers of housing development commenced suit against developer – Claim for rescission and other reliefs under sale and purchase agreements – Developer served third party notice against main building contractor for failure to complete project within prescribed time – Whether convenient to join main suit and third party action – Whether consistent with policy of Housing Development (Control and Licensing) Act 1966* E *– Whether just, expeditious and economical – Rules of Court 2012, O. 16 & 34*

The plaintiff, purchasers of residential properties in a development project ('project'), commenced a suit against the defendant, the developer, claiming for rescission and other reliefs in connection with the sale and purchase F agreements ('SPAs') on the residential properties ('main suit'). According to the plaintiffs, after the lapse of about five years since the date of the SPAs, the defendant still had not completed the project nor handed over vacant possession of the residential units to the plaintiffs. The defendant, in turn, served a third party notice against its main building contractor on the grounds that: (i) the main contractor refused and/or failed to fully complete the G construction of the project within the time limited for it to do so; and (ii) despite the main contractor bearing the primary obligation to make payments and to settle the claims of the sub-contractors for the project, the contractor failed, refused and/or neglected to do the same and subsequently prolonged the completion of the project ('third party action'). The issues that H arose for adjudication were (i) whether the court was bound to conduct a joint trial of the main suit and the third party action irrespective of the inconvenience and other undesirable factors concerning a joint trial in the case; and (ii) whether it was consistent with the policy of the Housing Development (Control and Licensing) Act 1966 ('Act') for the developer, I when sued by purchasers for liquidated damages under the sale and purchase agreement, to join the building contractor as a third party to have the claims and disputes under the building contract jointly tried together with the purchasers' claim for liquidated damages.

Held (striking out third party notice with liberty for defendant to file new and separate suit against third party and/or its directors):

(1) The basis of the plaintiffs' cause of action and the reliefs against the defendant was different from the basis of the defendant's causes of action and reliefs against the main contractor. The documents and witnesses for the two actions were very likely to be different. As purchasers, the plaintiffs were likely to rely on the standard SPAs and a few other documents which were not voluminous. The building contract between the defendant and the main contractor, on the other hand, was very likely to be voluminous. (paras 24 & 25)

(2) In a claim and dispute in connection with the SPAs, matters pertaining to extension of time, variations and the like, had no relevance or bearing on the issues between the developer and the purchasers. However, in an action between the developer and the building contractor on claims and disputes in connection with the building contract, numerous and/or complicated issues of extensions of time, variations, certifications of value of works, defects in works, payment obligations *etc* are common. Building contract claims and disputes between the developer and the building contractor are usually complicated and complex with technical architectural and engineering issues and would entail a prolonged trial. The trial of the issues in the main suit would be very much simpler and shorter than the trial of the issues in the third-party action. (para 26)

(3) The full trial dates for the main suit had been set down for eight days in November and early December 2022. The plaintiffs and the defendant had completed the pleadings, bundles of documents and other pre-trial preparations except for the witness statements. The third-party action was still at a preliminary stage where the defendant still proposed to amend its third-party notice. Any joinder of trials of the main suit with the third-party action would delay the full trial because subsequent procedural steps in the third-party action would derail the full trial dates already set down. This was also inconsistent with the policy of O. 34 of the Rules of Court 2012, for just, expeditious and economical disposal of action. (para 27)

(4) The joint trial of the main suit and the third-party action would be inconvenient. Therefore, separate trials should be carried out for the main suit and the third-party action. The policy and objective of the Act, in protecting the rights and interests of house buyers, would be frustrated or defeated if the claims of house buyers in the courts were to be intertwined with and bogged down through third party proceedings by the much more complicated and lengthy claims and disputes between the developers and their contractors. It would be unjust and oppressive for these house buyers. (paras 29-32)

Legislation referred to:
Rules of Court 2012, O. 15 rr. 5, O. 16 rr. 1(1), 4(3), (4), O. 34 r. 1(1)

For the plaintiffs - Harneshpal Singh Bhullar Karamjit Singh; M/s Lui & Bhullar
For the defendant - Nur Zureen Zamri; M/s Shu Yin, Teh & Taing
For the 3rd party - Wincy Chia; M/s Kevin & Co

Reported by Najib Tamby

JUDGMENT

Tee Geok Hock JC:

Introduction

[1] The broad issues in the matter at hand are (i) whether the court is bound to conduct a joint trial of the plaintiff's original action and the defendant's third party action irrespective of the inconvenience and other undesirable factors concerning joint trial in the case, and (ii) whether it is consistent with the policy of the Housing Development (Control and Licensing) Act 1966 for the developer, when sued by purchasers for liquidated damages under the Schedule H sale and purchase agreement, to join the building contractor as a third party to have the claims and disputes under the building contract jointly tried together with the purchaser's claim for liquidated damages.

[2] On 15 September 2022, this court answered both the abovementioned questions (i) and (ii) in the negative and ordered that the developer's third-party notice against the building contractor be struck out with liberty for the developer to file its said claims against the building contractor and/or its directors in a separate suit.

[3] The plaintiffs-purchasers have filed the present suit against the defendant-developer wherein the plaintiffs are claiming for declaration on rescission of contract and other reliefs in connection with the statutory sale and purchase agreements on residential properties in a residential development project. The gist of the plaintiffs' complaint is that after the lapse of about five years since the date of the sale and purchase agreements the defendant-developer still has not completed the project nor has it handed over the vacant possession of the residential units to the plaintiffs-purchasers and hence the purchasers could validly terminate or rescind the agreements. The defendant in its defence denied the plaintiff's claims and alleged that the project was issued conditional certificate of completion and compliance in February 2020.

[4] Within the time prescribed by O. 16 r. 1(1) of the Rules of Court 2012 and without the leave of the court, the defendant-developer on 3 November 2021 issued and served a third-party notice (encl. 7) against All Ways Builder Sdn Bhd, its main building contractor who was appointed to carry out the

construction works in the development project. The main bases of the defendant-developer's claim for contribution and damages against its main contractor All Ways Builder Sdn Bhd ("All Ways Builder") are the allegations that (i) All Ways Builder refused and/or failed to fully complete the construction of the Damai Vista Project within the time limited for it to do so; and (ii) despite All Ways Builder bearing the primary obligation to make payments and to settle the claims of the sub-contractors for the Damai Vista Project, All Ways Builder failed, refused, and/or neglected to do the same thereby prolonging and/or causing the prolongation in the completion of the Damai Vista Project.

[5] The defendant-developer filed its defence (encl. 8) on 3 November 2021 very shortly after its filing of the third-party notice.

[6] By encl. 10, the defendant filed notice for third-party directions on 18 November 2021.

[7] By encl. 14 filed on 30 December 2021, the third party applied for the action to be transferred from another court to this court.

[8] On 20 January 2022, the defendant filed an application to amend the third-party notice so as to add the directors of All Way Builder as the additional third parties in the third-party proceeding. In view of the pending application for transfer, encl. 17 has not been heard or disposed yet.

[9] The defendant-developer's proposed claims against the developer's directors are that they had allegedly conspired and combined together wrongfully and with the sole or predominant intention of injuring Euroland and/or causing loss to them by illegally and unjustifiably causing Euroland's funds to be channelled out through the Damai Vista Project through lawful and/or unlawful means and thereby prolonging and/or causing to prolong the completion of the Damai Vista Project.

[10] The suit was then transferred from another court to this court pursuant to a court order dated 9 February 2022.

[11] During case management on 29 March 2022, this court invited parties to file written submissions as to whether the third-party action ought to be tried together with the main action for the purposes of the defendant's application for third party directions dated 18 November 2021 ("encl. 10").

[12] The parties filed their written submissions regarding the question on joint trial.

[13] On 15 September 2022, this court struck out the third party notice and the notice for third party directions with no order as to costs, terminated the proceedings on the third party notice with liberty for the defendant-developer to file a new separate suit against the third party-contractor and, if the defendant so wishes, to join the directors of the contractor (*ie*, the persons named in encl. 17 application) as co-defendants in that new and separate suit.

[14] Dissatisfied with the said decision dated 15 September 2022, the defendant-developer has appealed to the Court of Appeal.

Legal Principles

[15] The relevant provisions of the ROC 2012 regarding joinder of parties and joinder of causes of action include the following:

> **Court may order separate trials** (O. 15 r. 5)
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> 5. (1) If claims in respect of two or more causes of action are included by a plaintiff in the same action or by a defendant in a counterclaim, or if two or more plaintiffs or defendants are parties to the same action, and *it appears to the court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the court may order separate trials or make such other order as may be expedient*.
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> (2) If it appears on the application of any party against whom a counterclaim is made that the subject matter of the counterclaim ought for any reason to be disposed of by a separate action, the *court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient*.
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> **Third party directions** (O. 16 r. 4)
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> 4. (1) If the third party enters an appearance in Form 21, the defendant who issued the third party notice shall, by a notice of application to be served on all the other parties to the action, apply to the court for directions. ...
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> (3) *On an application for directions under this rule, the court may*:
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> (a) if the liability of the third party to the defendant who issued the third party notice is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant;
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> (b) *order any claim, question or issue stated in the third party notice to be tried in such manner as the court may direct*; or
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> (c) *dismiss the application and terminate the proceedings on the third party notice*,
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> *and may do so either before or after any judgment* in the action has been signed by the plaintiff against the defendant.
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> (4) On an application for directions under this rule, the court may give the third party leave to defend the action, either alone or jointly with any defendant, upon such terms as may be just, or to appear at the trial and to take such part therein as may be just, and generally may make such orders and *give such directions as appear to the court proper for having the rights and liabilities of the parties most conveniently determined* and enforced and as to the extent to which the third party is to be bound by any judgment or decision in the action.
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> (emphasis added)

[16] In cases where parties or causes of action have already been joined in the third party notice which have already been issued, O. 16 r. 4(3) and O. 16 r. 4(4) of ROC 2012 empower the court to order separate trials of the main suit and the third party proceeding or separate trials of the causes of action where circumstances are appropriate for doing so, to wit, where it appears to the court "proper for having the rights and liabilities of the parties most conveniently determined". This criterion on convenience is similar to one of the limbs of the provisions in O. 15 r. 5 which stipulate it as "it appears to the court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient."

[17] The criterion regarding convenience of the trial and the determination of the rights and liabilities of the various parties in the joined proceedings is a common criterion for considering whether to order joint trials or separate trials. From the similar criterion of convenience, it can be concluded that joinder of causes of action and joinder of trials whether in the same original action or in the third-party proceeding is dependent upon the court's discretionary assessment of whether or not it appears that such joinder of causes of action or joint trials would be convenient for determining the rights and liabilities of the various parties in the joint proceedings.

[18] Convenience in this context is not the convenience of one party at the expense of inconvenience, prejudice or injustice to another party in the joined proceedings. The question of convenience or inconvenience has to be considered by striking a balance between the conflicting interests of the various parties in the joined proceedings in light of the underlying policies and important features of the court rules and also in light of the policy and objective of the applicable statute. Thus, the convenience in this context cannot be viewed in isolation but should be viewed in the overall context of the Rules of Court 2012 including the policies underlying the court rules and the important features in the court rules and also, in cases relating to the purchasers' claims against the developer in respect of the statutory sale and purchase agreements under the Housing Development (Control and Licensing) Act, the policy and objective of the said Act.

[19] O. 34 r.1(1) of the ROC 2012 provides as follows:

> **Orders and directions for just, expeditious and economical disposal of proceedings** (O. 34 r. 1)
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> 1. (1) **Notwithstanding anything in these Rules, the court may, at any time alter the commencement of proceedings, of its own motion**, direct any party or parties to the proceedings to appear before the court, in order that the court **may make such order or give such direction as it thinks fit so that**:
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> (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and

A (b) **such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof**.

(emphasis added)

B **[20]** The phrase "Notwithstanding anything in these Rules" in O. 34 r. 1(l) shows that the criteria and objective of "just, expeditious and economical disposal" of civil proceedings are overriding considerations in managing civil proceedings and conducting trials in civil suits in the courts, and these criteria and objective override any contrary provisions in the other parts of the Rules of Court 2012.

C **[21]** Hence, in considering whether or not a joint trial of causes of action or joinder of parties would be inconvenient, the court should take into account and give due weight to the question of just, expeditious and economical disposal of civil suits in court – a main policy and/or important feature of the court rules as embodied in O. 34 r. 1(1).

D **[22]** Apart from the abovementioned factors, the court when considering whether or not a joint trial of causes of action or joinder of parties would be inconvenient or inappropriate should also consider the statute governing the plaintiff's cause of action in the suit in order to ascertain whether a joint trial of the plaintiff's cause of action with the defendant's causes of action against the third party is consistent with or consonant to the policy and objectives of the statute. In our case here, the relevant statute is the Housing Development (Control and Licensing) Act 1966.

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Application Of Legal Principles To The Pleaded Facts And Circumstances Of The Present Case

F **[23]** In our present case, the plaintiffs are claiming for rescission and other reliefs in connection with the statutory sale and purchase agreements on residential properties, whereas the third party notice involves the developer/defendant suing the building contractor in the third party notice for failure to complete the construction works in the project and failure or neglect to pay the subcontractors for the completion of the construction works in the project: see the third party notice in encl. 7.

G **[24]** The basis of the plaintiffs' cause of action and reliefs against the defendant-developer (*ie*, the statutory sale and purchase agreement) is different from the basis of the defendant-developer's causes of action and reliefs against the main contractor (*ie*, the building contract), the documents for the two actions are very likely to be different, and the witnesses are likely to be different. This is a factor which leans against joint trial.

H **[25]** As purchasers in the project, the plaintiffs in the main action are likely to rely on the standard sale and purchase agreement and a few other documents which are not voluminous, whereas the building contract between

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the defendant-developer and the third party – main contractor is very likely to be voluminous, their building contract disputes on delays and related issues are likely to be many, complicated and prolonged. This is the second factor which tends to make it inconvenient for the purchaser's claims against the developer to be jointly tried with the developer's claims and disputes *vis-a-vis* the building contractor.

[26] In a claim and dispute in connection with the Schedule H sale and purchase agreement, matters pertaining to extension of time, variations, and the like have no relevance or bearing on the issues between the developer and the purchaser. However, in an action between the developer and the building contractor on claims and disputes in connection with the building contract, numerous and/or complicated issues of extensions of time, variations, certification of values of works, defects in works, payment obligations, *etc* are common. Building contract claims and disputes between developer and building contractor are usually complicated, complex with technical architectural and engineering issues, and entail prolonged trial. It appears to this court that the trial of the issues in the main action between the plaintiff and the defendant would be very much simpler and shorter than the trial of the issues in the third party proceeding between the defendant-developer and the third party-main contractor. This renders it very inconvenient for the claims and disputes between developer and building contractor to be tried together with the purchaser's claims against the developer. This is the third factor which heavily leans against such joint trial.

[27] The full trial dates for this action has been set down for eight days in November and early December 2022. The plaintiffs and the defendant have completed the pleadings, bundles of documents and other pre-trial preparations except for the witness statements. The defendant's third-party proceedings are still at a preliminary stage where the defendant still proposed to amend its third-party notice. Any joinder of trials of the plaintiffs-purchasers' main action with the defendant-developer's action in the third-party notice would delay the full trial because the subsequent procedural steps in the third-party proceedings would derail the full trial dates already set down here. This especially so where it is likely that the voluminous documents would be filed and exchanged in the building contract disputes between the defendant-developer and the third-party and the much longer time would be needed to carry out pre-trial case management and pre-trial preparations in the building contract disputes. It is also inconsistent with the policy of O. 34 (just, expeditious and economical disposal of action) for the plaintiffs-purchasers' action herein to be joined with or tried together with the defendant/developer's claims against its building contractor. This is the fourth factor which leans against a joint trial here.

[28] In the plaintiffs-purchasers' main suit, the main complaints of the purchasers are that the developer's delay in completing the project would entitle the plaintiffs-purchasers in terminating or rescinding their sale and purchase agreements and that their respective sale and purchase agreements stipulated the time period for completion of property units and the delivery of vacant possession to be three years from the date of the sale and purchase agreement but despite the lapse of about five years, the developer still has failed or neglected to complete the same. The main document relied upon by each plaintiff would be his/her sale and purchase agreement, the contract terms thereof and several short documents to prove the purported termination and the non-completion of the property units as at the trial date. In the main suit, the defences available to the defendant-developer would be those stipulated in the sale and purchase agreement or permitted by the laws. The full trial of the main action is unlikely to involve many factual disputes or much oral evidence. However, in the defendant-developer's claims against the third party – building contractor, the developer's claims are likely to be different from those of the plaintiffs-purchasers' claims in the main action. The documents and witnesses would be very different, and there will be extensive oral evidence to be adduced in the attempt and effort to the building contract claims and disputes. The full trial of the issues in the plaintiffs' main suit is expected to be very, very much shorter than the full trial of the defendant-developer's issues *vis-a-vis* the main contractor All Ways Builder. As the defendant-developer's allegation against the third party-contractor is the alleged non-payment to subcontractors, the subcontractors would likely be called as witnesses in the third-party proceedings with the result that numerous allegations and counter – allegations between the third party-contractor and its subcontractors would also be brought into issue in the joint trials, thereby further complicating and prolonging the joint trials.

[29] In the circumstances, it appears to this court that the joint trials of the plaintiffs-purchasers' main action and the defendant's third-party action would be inconvenient, and therefore this court finds that separate trials should be carried out for the plaintiffs/purchasers' main suit and the defendant/developer's third-party action against the main contractor.

[30] Further or alternatively, this court also finds that it would be unjust or rather oppressive to the purchasers of housing projects if their simple and short claims against the developers under the terms of the statutory sale and purchase agreements were allowed to be entangled with and bogged down by the complicated and lengthy claims and disputes between the developers and their main contractors in the housing projects.

[31] The policy and objective of the Housing Development (Control and Licensing) Act 1966 in protecting the rights and interests of house buyers would be frustrated or defeated if the claims by the house buyers in the courts

were to be intertwined with and bogged down through third party proceedings by the much more complicated and lengthy claims and disputes between the developers and their contractors. Joint trial of a house buyer's simple and short claims under the statutory sale and purchase agreement jointly together with the developer's complicated and lengthy claims and disputes *vis-a-vis* its contractors would also compel a house buyer to take part in a complicated and lengthy trial involving extensive time and great expenses for the purchaser's participation in the joint trial.

[32] Apart from unduly delaying the purchaser's recovery of his/her contractual entitlements, the house buyer is likely to be out of pocket by substantial amount even if he/she eventually obtains the judgment after the joint trial because the party-to-party costs awarded to the house buyer will not be able to fully cover his/her expenses of legal fees and disbursements on solicitor-and-client basis of costs. For an individual purchaser of a housing unit, such financial burden of shouldering the additional costs and expenses of a lengthy and complication joint trial would be unjust or uneconomical.

[33] If the courts were to allow such joint trials as a matter of common practice, many an individual purchaser of housing unit would not have the ability and courage in future to file any suit against a developer for damages under or for reliefs in connection with the statutory sale and purchase agreement due to the fear of being dragged into and bogged down by the lengthy, complicated and expensive joint trial together with the developer's third party proceedings against the building contractor. This would either defeat, or be contrary to, the social objectives of the Housing Development (Control and Licensing) Act 1966.

[34] In the premises, any joint trial of the main action and the third party proceeding in the circumstances of our present case would not be consistent with the main policy of "just, expeditious and economical disposal" of cases laid down in O. 34 r. 1(1) of ROC 2012 and also would be contrary to the policy and objective of the Housing Development (Control and Licensing) Act 1966.

Conclusion

[35] As this court has come to the conclusion that the joint trial of the plaintiffs-purchasers' main action and the defendant-developer's third party action in our present case would be inconvenient and/or would be contrary to the policy and objective of just, expeditious and economical disposal of civil proceedings, this court pursuant to O. 34 r. 1(1) read with O. 16 r. 4 has terminated the third party proceedings by striking out the third party notice with liberty for the defendant-developer to file a new and separate suit against the building contractor and/or its directors.